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No. 82-103

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN AND DOLORES RANK, PETITIONERS

v.

ROBERT P. NIMMO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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1. Petitioners, a veteran and his wife, purchased a house in Pomona, California, in 1971 with a loan guaranteed by the Veterans Administration (Pet. App. 2, 86-87). The loan was secured by a mortgage on the property held by Trinity Mortgage Company and serviced by respondent Kissell Company. In February 1975, petitioners stopped making payments on their loan (Pet. App. 11). Respondent Kissell Company instituted foreclosure proceedings and, in April 1976, purchased the property at a non-judicial foreclosure sale. Just prior to foreclosure, the VA determined not to exercise its discretionary authority under 38 U.S.C. 1816(a) to receive an assignment of the defaulted loan and to refund it (Pet. App. 13-14).

Petitioners filed this lawsuit in the United States District Court for the Central District of California, seeking, in essence, to set aside the foreclosure sale (Pet. App. 14-15). On cross motions for summary judgment, the district court held that the federal respondents (the VA, its Administrator, and its Director for the Los Angeles Region) had not adequately serviced petitioners' loan and had failed to give proper consideration to the VA's assignment/refunding authority (Pet. App. 76-117; 460 F. Supp. 920).

The court of appeals reversed (Pet. App. 1-75; 677 F. 2d 692). In a comprehensive opinion, the court of appeals ruled that: (1) "the well-established principles of *Cort* v. *Ash*, 422 U.S. 66 (1975), and its progeny compel the conclusion that no implied cause of action exists under the VA Act against the VA or the private lender for failure to help a veteran borrower avoid foreclosure" (Pet. App. 18; footnote omitted); (2) "the VA Act, by its terms, imposes no legal duty upon the VA to undertake loan servicing of VA-guaranteed loans" (Pet. App. 22); (3) the statutory provision authorizing VA funding of defaulted loans (38 U.S.C. 1816(a)) "makes clear that Congress intended to vest the widest discretion possible in the Administrator," precluding judicial review of his decisions to assign and refund loans in particular cases (Pet. App. 29-31); (4) "[n]othing in the statutory language or history of section 1816(a) indicates that Congress intended to require the VA to exercise the assignment-refunding option * * *" at any particular time (Pet. App. 32-33); and (5) "foreclosure by a private lender of a mortgage in a federal mortgage guaranty program does not involve federal action sufficient to invoke the due process clause of the Fifth Amendment" (Pet. App. 38). Judge Reinhardt dissented on the refunding issue only (Pet. App. 47-64).

2.a. Petitioners concede (Pet. 12) that the VA's decision whether to pay the unpaid balance of an obligation and

accept assignment of the loan and security under 38 U.S.C. 1816(a) is "committed to agency discretion" and therefore unreviewable. Petitioners vaguely assert (Pet. 15), however, that "when Congress grants an agency discretion, it intends that the discretion be exercised unless expressly stated otherwise." There is no reason for this Court to consider the possible application of that broad proposition in this case. The court of appeals correctly ruled that the VA is under no statutory obligation to establish specific procedures or a specific program for determining whether delinquent loans should be assigned and refunded. There is no conflict among the courts of appeals on that issue. Furthermore, in this case the VA specifically considered the assignment-refunding option and rejected it as inappropriate.

Section 1816(a) provides that upon notice of a veteran's default the VA "Administrator may, at the Administrator's option, pay the holder of the obligation the unpaid balance of the obligation plus accured interest and receive an assignment of the loan and security" (38 U.S.C. 1816(a)). As the court of appeals commented, this provision "makes clear that Congress intended to vest the widest discretion possible in the Administrator" (Pet. App. 29). "Congress * * * used the precatory 'may' and then, as if to leave no doubt, added, '*at the Administrator's option*' " (*ibid.*; emphasis in original). This grant of authority to the VA Administrator cannot be read to require any specific procedure or program for determining whether assignment or refunding is appropriate; it clearly does not contemplate the sort of formal determination that petitioners apparently envision. Indeed, the history of Section 1816(a) indicates that Congress did not have refunding in mind at all when it enacted the provision, but merely sought to provide the VA an alternative to paying the guaranty when veterans default. See Pet. App. 68-70; *Gatter* v. *Nimmo*, 672 F. 2d 343 (3d Cir. 1982).

b. At bottom, petitioners assert that the VA has generally ignored its authority to help veterans in distress through the refunding of mortgages. The record in this case indicates, however, that petitioners' mortgage was considered for assignment and refunding, but that option was rejected as "not warranted" (Pet. App. 14, 126).[1] No mortgages were refunded in the Los Angeles area between 1974 and 1976, the period when petitioners defaulted (*id.* at 113-114). But that circumstances does not indicate that the VA did not seriously consider the assignment/refunding option. The VA's usual practice is to persuade private lenders to maintain the mortgages of defaulting, but deserving, veterans, which would take care of most situations in which refunding might otherwise be appropriate. The VA must reserve refunding as a remedy for the extraordinary cases in which a lender refuses forbearance, but the risk to the VA of assignment is nonetheless insignificant. Absent a congressional mandate, and appropriation of money, to subsidize veterans who cannot afford their homes, a liberal assignment and refunding policy would effectively convert the VA's home loan guaranty program into a grant program, and would deplete funds for the guaranty program, to the detriment of veterans. Cf. *United States* v. *Shimer*, 367 U.S. 374, 387 (1961) ("the entire history of the 'home loan' provisions of the statute is inconsistent with an intent to make outright grants * * *.").

c. Contrary to petitioners' claims (Pet. 16-21), the decision of the court below does not conflict with any decision of this Court or a court of appeals. Neither *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), nor *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197 (1941) is

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[1] At the time the VA decided not to exercise its assignment/refunding authority, petitioners had already received 16 months of forbearance by Kissell Company.

implicated here.[2] Petitioners cite a number of cases in support of their proposed rule that administrative agencies must exercise the discretion that Congress grants them (Pet. 16-23). We do not dispute that abstract principle. Nonetheless, as the court of appeals noted in considering several of the cases cited by petitioners, their common thread is an "applicable statute or legislative history [that] clearly revealed a Congressional intent to require the agency to implement a statutory program" (Pet. App. 34).[3] There is no statute or legislative history that requires VA action in the present context. See *Gatter* v. *Nimmo, supra; Fitzgerald* v. *Cleland*, 650 F. 2d 360, 361 (1st Cir. 1981), aff'g 498 F. Supp. 341, 351 (D. Me. 1980); *Simpson* v. *Cleland*, 640 F. 2d 1354 (D.C. Cir. 1981); cf. *United States* v. *Harvey*, 659 F. 2d 62 (5th Cir. 1981).[4]

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[2]In *Accardi*, the Board of Immigration Appeals allegedly failed to exercise independent judgment, improperly denying discretionary relief from deportation to an alien because the Attorney General had designated him an "unsavory" character. That case involved an adjudicatory proceeding in which the BIA was obliged by formal rules to exercise its discretion. Moreover, as noted above, the Administrator specifically considered the assignment-refunding option for petitioners and rejected it as "not warranted" (Pet. App. 126). The statement from *Phelps Dodge Corp.* upon which petitioners rely (Pet. 17) reflects the Court's concern about effective judicial review of NLRB remedial orders; as petitioners concede, judicial review is not a concern in this case.

[3]*United States* v. *Edwards*, 368 F. 2d 722 (4th Cir. 1966), does not conflict with the court of appeals' decision. *Edwards* established no rule of law, but simply remanded for further factfinding. Moreover, *Edwards* involved due process considerations because the government had seized the defendant's property for forfeiture. The court below held that the Due Process Clause was not implicated here (see Pet. App. 38), and petitioners do not challenge that holding.

[4]Significantly, in 1978 Congress considered a proposed amendment to 38 U.S.C. 1816(a), which would have provided that, prior to foreclosure, "the Administrator * * * *shall*, under regulations which the Administrator *shall* prescribe, investigate, with due regard for any reasonable forbearance by the Administrator for the benefit of the

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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veteran, the desirability of * * * receiving an assignment of the loan * * *." See S. Rep. No. 95-1055, 95th Cong., 2d Sess. 6 (1978) (emphasis added). Although passed by the Senate, 124 Cong. Rec. 24622 (1978), the provision was dropped from the final bill (124 Cong. Rec. 32293 (1978)); 124 Cong. Rec. 33102 (1978). See Pub. L. No. 95-476, 92 Stat. 1497.

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